Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-115

JERRY DI DONATO,

Appellant,

vs.

CHARLES FELDMAN and
WILLIAM FELDMAN,

Appellees.

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF

APPEAL FROM
THE COURT OF APPFAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

BERNARD S. KAMINE
SHAPIRO & MAGUIRE LAW
CORPORATION

8500 Wilshire Boulevard
Suite 1026
Beverly Hills, CA 90211
(213) 655-5170

Attorneys for Appellees

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TOPICAL INDEX

	Page
Table of Authorities	ii
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
SUMMARY OF THE ARGUMENT	6
ARGUMENT	7
THERE IS AMPLE EVIDENCE TO SUPPORT THE CONCLUSION THAT APPELLANT ACTUALLY RECEIVED NOTICE OF THE PENDENCY OF THIS ACTION IN SUFFICIENT TIME TO MAKE AN APPEARANCE BEFORE THE DEFAULT JUDGMENT WAS ENTERED; THEREFORE, APPELLANT WAS AFFORDED DUE PROCESS (U.S. CONST., AMENDMENT 14, SECTION 1)	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950)	9
Constitution	
United States Constitution:	
Fourteenth Amendment	6, 7
Statutes	
California Code of Civil Procedure §415.30	3
Rules	
U.S. Supreme Court Rules,	
Rule 16	1

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Appellees move the Court, pursuant to Supreme Court Rule 16, to dismiss this appeal for lack of a substantial federal question, and in support thereof tender the following brief:

STATEMENT OF THE CASE

The Statement of the Case is fairly presented in the Section "Opinions Below", Appellant's Jurisdictional Statement, pp. 1-2.

STATEMENT OF THE FACTS

Appellant is a concrete subcontractor, who has conducted his business from 19448 Saticoy Street, Reseda, California, for a number of years. That address is a combination home and business, and is also used by appellant's adult son.

On March 27, 1973, appellant entered into a subcontract with appellees to do the concrete work on a project in Los Angeles. That subcontract contained a paragraph permitting appellees to take over appellant's work if his work was in any respect unsatisfactory.

Subsequently, appellant failed to complete the work. So, pursuant to the subcontract, appellees sent him a written notice to complete the work or be replaced, on or about May 8, 1973. It was followed by a similar demand from appellees' counsel on May 14, 1973. In the letter from appellees' counsel, appellant was advised that, unless he returned to the project and finished his work, he would be sued for the damages caused appellees in having to take over and finish appellant's portion of the project.

Appellant admitted receiving a copy of this letter.

Appellant failed to return to the project; so, on May 17, 1973, appellees entered into a subcontract with another to finish the concrete work. Two weeks later, on May 30, 1973, the instant action was commenced.

The next day, on May 31, 1973, mail service pursuant to California Code of Civil Procedure §415.30 was attempted, by mailing a copy of the Summons, Complaint and a Notice and Acknowledgement of Receipt to appellant. Appellant denies receiving this communication. On June 26, 1973, a follow-up letter was mailed to appellant. Appellant could not remember whether he received this letter.

Thereafter, a licensed private investigator made three attempts to personally serve appellant with the Summons and Complaint. The first attempt occurred on June 27, 1973 at approximately 9:10 p.m. Appellant's adult son was home and informed the process server that appellant lived there, but that he kept irregular hours and was not in. The son said he

did not know when appellant would return.

The process server next attempted to personally serve appellant on June 30, 1973, at about 8:40 a.m. At that time he found the gates entering into the property to be locked, and he could not gain admission to approach the house.

The third attempt to personally serve appellant occurred on July 3, 1973, at approximately 10:55 a.m. This time the process server again found appellant's adult son at home, but not appellant. He informed the son that he was there to serve process on appellant; the son refused to accept the documents, so the process server dropped them at the son's feet. The son later denied this incident, but the trial court resolved this conflict in the evidence against appellant. That resolution of the conflict was binding on the California Appellate Court (Opinion, Appellant's Jurisdictional Statement, page B7), and also should be binding on this Court. Seventeen days later the process server mailed a copy of the Summons and Complaint to appellant, as required by the California Code of Civil

Procedure. Appellant denied getting this mailing.

On August 22, 1973, the first Request to Enter Default was served by mail on appellant. He admitted receiving this document. In fact, the very next day, on August 23, 1973, he called the office of appellees' attorneys, and, being unable to speak to an attorney, left a message with one of the secretaries.

On August 29, 1973, another civil trial, in which appellant was plaintiff, commenced in the Los Angeles County Superior Court. Apparently, on August 30, 1973, appellant showed the first Request to Enter Default in the instant case to his attorney in the other case; that attorney instructed appellant to go to the Clerk's office to get a copy of the entire file. Appellant did so, showed it to his attorney and they discussed the matter.

On October 2, 1973, the jury returned a substantial verdict in favor of appellant in his other civil case. On that same day a second Request to Enter Default in the instant case was served by mail on him. Appellant could not remember whether

he received the second Request to Enter Default, but admitted that he may have.

On November 10, 1973, appellees proved up their case and obtained the judgment now involved in the instant appeal.

Thereafter, appellees filed a lien against appellant's judgment in the other civil action, which lien immediately came to the attention of appellant's attorney, who then brought it to the attention of appellant. At that point the instant case suddenly became very important to appellant. On December 3, 1973, appellant filed his first Motion to Set Aside the Default and the Default Judgment. That Motion and a subsequent Motion were denied.

SUMMARY OF THE ARGUMENT

There is ample evidence to support the conclusion that appellant actually received notice of the pendency of this action in sufficient time to make an appearance before the default judgment was entered; therefore, appellant was afforded due process (U. S. Const., Amendment 14, Section 1.)

ARGUMENT

THERE IS AMPLE EVIDENCE TO SUPPORT THE CONCLUSION THAT APPELLANT ACTUALLY RECEIVED NOTICE OF THE PENDENCY OF THIS ACTION IN SUFFICIENT TIME TO MAKE AN APPEARANCE BEFORE THE DEFAULT JUDGMENT WAS ENTERED; THEREFORE, APPELLANT WAS AFFORDED DUE PROCESS (U.S. CONST., AMENDMENT 14, SECTION 1).

After reviewing all the communications to appellant in this case, from the first letter to him threatening suit before it was even filed, through the Request for Entry of Default which he admitted receiving, the California Court of Appeals observed.

> "This irregularity that Di Donato [appellant in the instant appeal] experienced in receiving communications from plaintiffs' counsel, addressed to the same address, seems somewhat strange even in these days of an undependable postal service." (Opinion, Appellant's Jurisdictional Statement, p. B5.)

At this point the California Court of Appeal inserted footnote 5 which reads:

> "Evidence Code Section 641 creates a rebuttable presumption that a letter, correctly addressed and properly mailed is received in the ordinary course of mail." (Opinion, Appellant's Jurisdictional Statement pp. B5-6.)

It is clear from this and other discussions in the Opinion of the California Court of Appeal, e.g., "We hold...that this appeal, at the very least, borders on the frivolous...." (Opinion, Appellant's Jurisdictional Statement, page B3; see also first paragraph of the Opinion at Appellant's Jurisdictional Statement, page B9) that the California Court of Appeal determined that appellant actually received notice of the pendency of this action--either from the service of the Summons and Complaint or though the various mailings addressed to him--prior to the time the default judgment was entered, therefore, in sufficient time to make an appearance in this case.

The due process clause of the United States Constitution does not prescribe a particular manner within which a litigant is to receive notice of pending litigation. As this Court stated in Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306, 314, 94 L.Ed. 865, 70 S.Ct. 652 (1950):

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action.... The notice must be of such nature as reasonably to convey the required information... and it must afford a reasonable time for those interested to make their appearance.... But if with due regard to practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied."

The California trial and appellate courts determined that appellant actually received notice of the pendency of this action in sufficient time to make an appearance before the default judgment was entered, and that finding is sufficient to sustain the judgment.

Hence, the dispute turns on a finding of fact which was determined adversely to appellant, and which in any event, is not significant enough to raise a substantial federal question about due process.

CONCLUSION

For the foregoing reasons, appellees urge that the Motion to Dismiss the Appeal be granted.

Respectfully submitted,

SHAPRIO & MAGUIRE LAW CORPORATION

By: BERNARD S. KAMINE

Attorneys for Appellees